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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-1430

SPENCER HARDNEY, APPELLANT,

v.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before DAVIS, *Chief Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

DAVIS, *Chief Judge*: U.S. Army veteran Spencer Hardney appeals through counsel from that part of a March 6, 2015, Board of Veterans' Appeals (Board) decision that declined to refer his claim for diabetes mellitus for extraschedular consideration.¹ For the following reasons, the Court will set aside the March 2015 Board decision and remand the matter for further proceedings.

I. ANALYSIS

Mr. Hardney asserts that the Board provided inadequate reasons or bases for its determination that referral for consideration of an extraschedular evaluation for his service-connected diabetes mellitus was not warranted. The Court agrees.

Section 3.321(b)(1), title 38, Code of Federal Regulations, provides the following:

To accord justice . . . to the exceptional case where the schedular evaluations are found to be inadequate, the Under Secretary for Benefits or the Director,

¹The Board also denied schedular disability ratings for diabetes mellitus in excess of 20% prior to March 8, 2009, and 40% since March 8, 2009. Because Mr. Hardney raises no arguments related to his schedular rating his briefs, those matters are deemed abandoned. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc) (holding that, where an appellant abandons an issue or claim, the Court will not address it); *Cacciola v. Gibson*, 27 Vet.App. 45, 57 (2015) (holding that, when an appellant expressly abandons an appealed issue or declines to present arguments as to that issue, the appellant relinquishes the right to judicial review of that issue, and the Court will not decide it); *Grivois v. Brown*, 6 Vet.App. 136, 138 (1994) (holding that issues or claims not argued on appeal are considered abandoned).

Compensation and Pension Service, upon field station submission, is authorized to approve on the basis of the criteria set forth in this paragraph an extra-schedular evaluation commensurate with the average earning capacity impairment due exclusively to the service-connected disability or disabilities. The governing norm in these exceptional cases is: A finding that the case presents such an exceptional or unusual disability picture with such related factors as marked interference with employment or frequent periods of hospitalization as to render impractical the application of the regular schedular standards.

38 C.F.R. § 3.321(b)(1) (2016).

In its evaluation, the Board must compare the level of severity and symptoms of a claimant's disability with the established criteria; if the Board determines that the rating schedule does not adequately describe the claimant's level of disability and that the claimant's exceptional disability picture exhibits other related factors such as "marked interference with employment" or "frequent periods of hospitalization," the case must be referred to the Under Secretary for Benefits or the Director of the Compensation Service to determine whether to assign an extraschedular disability rating. 38 C.F.R. § 3.321(b)(1); *see Thun v. Peake*, 22 Vet.App. 111, 116 (2008), *aff'd*, 572 F.3d 1366 (Fed. Cir. 2009). The Board may conclude that a claim does not meet the criteria for a referral for an extraschedular disability rating, but it must provide adequate reasons or bases for that conclusion. *Thun*, 22 Vet.App. at 116; *Bagwell v. Brown*, 9 Vet.App. 337, 339 (1996); *Floyd v. Brown*, 9 Vet.App. 88, 95 (1996).

Mr. Hardney's diabetes is rated pursuant to 38 C.F.R. § 4.119, Diagnostic Code (DC) 7913. He is currently in receipt of a 20% disability rating for the time period prior to March 8, 2009, which is appropriate for service-connected diabetes mellitus "[r]equiring insulin and restricted diet, or; oral hypoglycemic agent and restricted diet." *Id.*

Here, the Board concluded that

[t]he schedul[a]r criteria adequately describe [Mr. Hardney's] symptoms for his diabetes mellitus. These symptoms include multiple insulin injections daily, regulation of diet, regulation of activities, and hypoglycemic reactions that do not require hospitalization. Moreover, even if the schedul[a]r criteria were to prove inadequate, there is no record of marked interference with employment due to these service connected disabilities. He has not been hospitalized for diabetes, and is

employed full-time. Accordingly, referral for consideration of an extra-schedular rating is not warranted.

R. at 13. The Board's analysis is insufficient. The Board does not explain why, for example, Mr. Hardney's repeated assertions that he has suffered from hypoglycemic episodes at home and at work, wherein he exhibited confusion, personality change, blurred vision, motor weakness, sweating and tachycardia, are contemplated by the assigned schedular rating. *See* R. at 869. The Board also failed to account for a December 2007 private endocrinologist statement that Mr. Hardney's wife "is a well educated registered nurse who has thwarted paramedic and hospital visits with her interventions during hypoglycemic episodes." R. at 869. While a claimant must demonstrate all the criteria for the assignment of a particular *schedular* rating, the same is not true for extraschedular consideration. *See Camacho v. Nicholson*, 21 Vet.App. 360, 367 (2007) (holding that the criteria contained in 38 C.F.R. § 4.119, Diagnostic Code 7913, for diabetes are cumulative and therefore a claimant must demonstrate all the criteria for a particular rating); *see also Middleton v. Shinseki*, 727 F.3d 1172, 1178 (Fed. Cir. 2013) (holding that "because the 40% rating [for diabetes mellitus under DC 7913] does not contemplate alternative considerations, a veteran must demonstrate all of the required elements in order to be entitled to that higher evaluation."). Outside of the earlier schedular analysis, the Board made no attempt to *compare* Mr. Hardney's disability picture to the disability picture contemplated by the rating schedule as required by *Thun*. As Mr. Hardney persuasively asserts, the schedular criteria for a 20% disability rating accounts only for his insulin dependance and restricted diet; it does not account for his hypoglycemic episodes that are thwarted by his wife who is a trained nurse, his daily multiple insulin injections, and other various effects of his hypoglycemic episodes. A higher schedular disability rating is not the issue. If it were, extraschedular disability ratings would be superfluous.

As a final matter, the Board summarily concluded that Mr. Hardney does not demonstrate "marked interference with employment" because he is employed "full time." R. at 13. Full-time employment is not the benchmark for refusing extraschedular consideration. *See Kellar v. Brown*, 6 Vet.App. 157, 162 (1994) (noting the different standards for extraschedular disability ratings—

interference with employment-and total disability ratings based on individual unemployabilityunemployable or "unable to secure and follow a substantially gainful occupation"). Whether Mr. Hardney is employed is not the finding that the Board must make, but rather whether his service-connected disabilities cause *marked interference* with his employment. The Court notes that there is evidence of record that Mr. Hardney suffered from hypoglycemic episodes at work and that he must take breaks during these episodes. R. at 854-56. Whether these difficulties rise to the level of "marked interference with employment" is a factual determination that must be made by the Board in the first instance. *See Thun*, 22 Vet.App. at 115.

The Court therefore concludes that the Board's extraschedular analysis does not permit Mr. Hardney to understand why referral for extraschedular consideration was denied and prevents the Court from reviewing the Board's decision on this issue. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). Remand is therefore warranted. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998).

As always, on remand, Mr. Hardney will be free to submit additional evidence and argument on the remanded matter, and the Board is required to consider such evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court has held that "[a] remand is meant to entail a critical examination of the justification for the decision." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). The Board must proceed expeditiously, per 38 U.S.C. § 7112.

III. CONCLUSION

For the foregoing reasons, the Court SETS ASIDE the Board's March 6, 2015, decision and REMANDS the matter for further proceedings.

DATED: November 30, 2016

Copies to:

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